United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 16-0544**
	)	**Issued: June 15, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Dayton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 2, 2016 appellant, through counsel, filed a timely appeal from a November 25, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on January 25, 2013.

FACTUAL HISTORY

On January 23, 2014 appellant, then a 50-year-old medical administration specialist, filed a traumatic injury claim (Form CA-1) alleging that at 8:30 a.m. on January 25, 2013 he sustained injury due to a motor vehicle accident, which occurred on Interstate 71 approximately 25 miles east of Louisville, Kentucky. He did not stop work around the time of the claimed January 25, 2013 work injury, but he stopped work on November 25, 2013. On the same form appellant's immediate supervisor checked a box marked "No" indicating that the claimed January 25, 2013 work injury did not occur in the performance of duty and noted, "The purpose of the trip was exclusively to explore employment opportunities, [appellant] was not on a work detail." The supervisor indicated that appellant's regular duty station was the employing establishment Medical Center and that his regular hours were 7:30 a.m. to 4:00 p.m., Monday through Friday.

In a January 23, 2014 statement, appellant indicated that on January 25, 2013 he was on orders to proceed to a detailed assignment at the employing establishment's Valley Coastal Bend Health Care System facilities in Harlingen and Corpus Christi, Texas. He noted that he was attaching a copy of his travel orders. Appellant advised that he was driving in an ice storm near Louisville on January 25, 2013, the first day of his trip, when at approximately 8:00 or 9:00 a.m. he was involved in a motor vehicle accident, which caused his vehicle to roll over four times.[3] He indicated that his injuries, including pain/bruising in his neck and extremities, did not appear severe at the time of the January 25, 2013 accident, and that he continued his trip to the Valley Coastal Bend Health Care System facilities. Appellant noted that, when he returned to work in Dayton, Ohio, he reported the accident to his immediate supervisor and another employee, sought medical treatment from employing establishment physicians, and used annual and sick leave. He advised that it was not until December 2013 that he realized the full extent of his left hip and leg injuries due to the January 25, 2013 accident and he indicated that he suffered post-traumatic stress disorder due to the accident. Appellant asserted that his need for total hip replacement surgery was related to the January 25, 2013 accident.

In a Report of Contact with a "Date of Contact" of February 6, 2014, it was indicated that, "[Appellant] requested approval to take a trip to Texas to interview for a potential job assignment(s) and early placement out of the Technical Career Field Program [(TCFP)]."[4] The document provided a text of appellant's January 24, 2013 e-mail to several individuals, including his immediate supervisor, which was entitled, "Use of [TCFP] Funds for Final Placement Site Visit." In this e-mail appellant indicated that he wanted to clarify the purpose of his trip after speaking with an individual in the Chief Business Office of the TCFP. He advised that he was

[3] Appellant submitted copies of photographs which presumably depict his vehicle after the January 25, 2013 accident.

[4] Appellant's immediate supervisor signed the "Executed By" portion of the signature block for this employing establishment form.

going to two locations in Texas, the primary location being in Harlingen, and the secondary location being in Corpus Christi, to engage in site visits for permanent placement to complete the TCFP. Appellant indicated that he had already undergone telephone interviews and that the positions in both locations met the final placement criteria for the TCFP. He reported that his program manager for the TCFP in Atlanta, Georgia, could verify that TCFP funds could be used for the visits.

Appellant submitted the fourth page of a four-page document which lists the dates on which employees submitted expense reports. The document indicates that he submitted an expense report on February 21, 2013. An appointment list produced on January 23, 2014 shows medical clinic appointments made for appellant between March 4 and December 16, 2013.

In a letter dated February 6, 2014, a workers' compensation specialist for the employing establishment indicated that the employing establishment was challenging appellant's claim for a January 25, 2013 injury. The specialist advised that he was not in the performance of duty when the alleged work-related injury occurred on January 25, 2013 and that the purpose of his trip to Texas was exclusively to explore employment opportunities. She noted that appellant was not on a work-detail status from the employing establishment Medical Center as alleged. The specialist indicated that a 120-Day Commitment Agreement for the TCFP, signed by appellant on December 21, 2012, provided that the employing establishment could not offer him a position at the end of the TCFP, and that he was responsible for finding suitable employment prior to the end of the term of the TCFP.

The specialist attached a copy of the 120-Day Commitment Agreement signed by appellant on December 21, 2012 in which it was noted that his two-year anniversary date as an intern in the TCFP was September 26, 2013. Appellant signed a certification block in which he affirmed that, since his work facility could not offer him a position at the end of the TCFP, he understood that it was his responsibility to find suitable placement prior to the two-year anniversary of the date he was hired into the TCFP. He further affirmed that he agreed to work with the National Career Field Program Manager to find placement and that he understood he had to accept or decline a placement offer at least 60 days prior to his two-year anniversary date.

In a February 20, 2014 letter, OWCP requested that appellant submit additional factual and medical evidence and to complete an attached questionnaire in support of his claimed January 25, 2013 work injury. On the same date it requested additional information from the employing establishment and asked it to complete an attached questionnaire.

Appellant submitted a March 10, 2014 statement in which he asserted that various documents he was submitting in connection with the statement showed that he was on "approved travel" when he was injured in the January 25, 2013 accident. He indicated that he was driving his private-owned vehicle because a government-owned vehicle was not available for use. Appellant asserted that the January 25, 2013 accident occurred on the most direct route between the employing establishment Medical Center and the Valley Coastal Bend Health Care System facilities.[5] He indicated that he reported the January 25, 2013 accident to an official at the

[5] Appellant submitted copies of a map which he indicated showed the most direct route between Dayton and Harlingen as derived from an internet map service.

Valley Coastal Bend Health Care System facility in Harlingen when he arrived there after the accident.

Appellant submitted a January 18, 2013 e-mail to a TCFP official in which he advised that he had been asked to travel the following week to Corpus Christi for a site visit. His e-mail was sent in response to a January 18, 2013 e-mail of the TCFP official indicating that a position opening might be announced. In a series of e-mails between appellant and an official with the Valley Coastal Bend Health Care System, dated on January 23 and 24, 2013, he indicated that his travel to the Valley Coastal Bend Health Care System facilities had been approved by his "chief" and that he would be using TCFP funds for the trip.[6] The official advised that the specialist would be able to meet with him on January 31, 2013 to discuss a position opening at the Harlingen facility. She indicated that she had no authority to discuss any position openings at the Corpus Christi facility. In a January 24, 2013 e-mail to appellant, which was copied to his immediate supervisor, a TCFP program manager in Atlanta advised that TCFP funds could "be used towards a site visit for permanent placement." In a February 4, 2013 e-mail to his immediate supervisor in Dayton, appellant advised that he was home and that he had "an interesting run in with an ice storm … which is why I am going to the [physician] today." He indicated that he would submit a travel authorization request.

A March 28, 2013 e-mail sent to appellant through an automated response system indicates, "You have an Expense Report which has been approved," and lists his immediate supervisor as the "Final Approver." A document lists expenses he incurred for lodging, meals, and mileage for the period January 25 to February 4, 2013 and contains the comments, "Site visit to south Texas for [TCFP] final placement. Shortened trip due to accident and business being done early." The last page of the document indicates that appellant submitted an expense report on February 21, 2013.[7]

The records contains a Memorandum of Understanding (MOU) signed in March 2013 by appellant, officials of the Valley Coastal Bend Health Care System, and officials of the employing establishment Medical Center, including appellant's immediate supervisor. The document concerns the prospective relocation of appellant's job from the employing establishment Medical Center to the Valley Coastal Bend Health Care System effective September 26, 2013. Appellant would begin working as a supervisory medical administration specialist at the Harlingen facility.[8] An MOU with the heading "Final Placement," indicates that on May 6, 2013 he would be transferred to the position of supervisory medical administration specialist at the Harlingen facility and that, effective September 26, 2013, he would be

[6] In a January 24, 2013 e-mail to the official, appellant indicated that "travel is approved" and that he would leave for his trip the next morning. In a January 23, 2013 e-mail, he requested a government car and indicated that his trip would last from January 25 to February 5, 2013.

[7] Appellant previously submitted this last page of the document.

[8] Appellant had previously submitted a job description for the position of supervisory medical administration specialist with the Valley Coastal Bend Health Care System. He also submitted a copy of the 120-Day Commitment Agreement he signed on December 21, 2012 with additional pages showing that his immediate supervisor signed the document on March 6, 2013.

permanently placed in the position.[9] In a May 6, 2013 memorandum to the TCFP program manager in Atlanta, appellant indicated that he made a site visit to Harlingen in January 2013. E-mails from mid-May 2013 show that he made the transfer to the Harlingen facility on May 6, 2013.

Appellant submitted an undated Kentucky Uniform Police Traffic Collision Report describing the January 25, 2013 motor vehicle accident. The police investigator, who arrived at the accident scene at 10:00 a.m., noted that appellant reported that he was driving north on Interstate 71 in his light truck when he lost control on icy roads, ran off the right shoulder, and overturned his vehicle to an upright position. The investigator reported that it was a "single vehicle" accident and that appellant was driving 70 miles per hour which was deemed "too fast for conditions."[10] Appellant submitted photographs of his injuries caused by the January 25, 2013 accident as well as photographs of his vehicle before and after the January 25, 2013 accident.

Appellant also submitted medical evidence in support of his claim, including a December 4, 2013 report in which Dr. Jarvis Earl, an attending Board-certified orthopedic surgeon, indicated that appellant had been seen for bilateral hip pain with pain radiating to his anterior thigh areas, left greater than right. He reported that the initial onset of pain was 30 years prior on the left due to an explosion in the military which dislocated the left hip and 5 years prior on the right. Dr. Earl diagnosed osteoarthritis of hip and hip pain, and he recommended total left hip arthroplasty and on a December 31, 2013 report, he performed a left total hip arthroplasty.

In an attending physician's report (Form CA-20) dated February 26, 2014, Dr. Earl indicated that appellant was totally disabled from December 4, 2013 to February 28, 2014 and partially disabled from March 1 to 21, 2014. He noted that appellant would be able to perform his regular work beginning March 22, 2014. On March 6, 2014 Dr. Scott L. Shelby, an attending chiropractor, diagnosed degenerative joint disease of his left hip.

In a March 21, 2014 letter, the workers' compensation specialist for the employing establishment, who had produced the February 6, 2014 letter submitted earlier, responded to OWCP's February 20, 2014 request for additional information. The specialist advised that appellant was not on an official temporary-duty (TDY) assignment at the time of his January 25, 2013 accident. She indicated that he traveled to Texas for a job interview, as expressed through a January 24, 2013 e-mail in which he noted that he would use TCFP funds for such travel. The specialist advised that, prior to the January 25, 2013 accident, appellant last performed his official duties on January 22, 2013 at his regular duty station, *i.e.*, the employing establishment Medical Center. She indicated that he was expected to perform his next official duty on February 4, 2013 at his regular duty station in Dayton. The specialist advised that appellant was not riding in or driving a government-owned car on January 25, 2013.

[9] Another MOU indicates that appellant would receive relocation benefits after a signed MOU for final placement was received.

[10] In an undated Automobile Accident Questionnaire completed for an attending physician, appellant indicated that the accident occurred at 9:30 a.m. on January 25, 2013 and noted, "Car accident on ice, rolled four times."

In a February 5, 2013 report of contact, appellant's immediate supervisor noted that appellant informed her that he had returned to the Dayton Veterans Affairs Medical Center following a trip to Texas to interview for a job as a part of his attempt to obtain early placement out of the TCFP. The supervisor noted that appellant advised her that he had been involved in a motor vehicle accident on January 25, 2013 while driving to Texas. Appellant further informed her that he had suffered some bruising without serious injury and that he continued with his trip plans following the accident. The supervisor noted, "[Appellant] was not in a detail status, but rather in a travel status."

On March 29, 2014 appellant responded to the employing establishment's March 21, 2014 letter. He again asserted that he had supplied a copy of an approved travel order to go to Texas for a site visit. Appellant indicated that on January 25, 2013 his appointed place of duty was to travel to Texas for a site visit and possible job placement there since the employing establishment Medical Center did not have a permanent position for him as indicated by the 120-Day Commitment Agreement. He asserted that he was required by the TCFP to travel to another site for placement and that this fact was supported by the MOU in the record. Appellant indicated that a May 6, 2013 memorandum to the TCFP program manager in Atlanta confirmed that he had made a site visit to Harlingen in January 2013. He noted that in a January 24, 2013 e-mail sent to him, which was copied to his immediate supervisor, a TCFP program manager in Atlanta advised that TCFP funds could be used towards a site visit for permanent placement.

In a May 6, 2014 decision, OWCP found that appellant had not met his burden of proof to establish an injury in the performance of duty on January 25, 2013. It determined that the evidence failed to support that the claimed injury occurred in the performance of duty as it did not occur in "the course of employment and within the scope of compensable work factors as defined by … FECA." OWCP explained that appellant's January 25, 2013 accident did not occur while he was on official duty status, but rather occurred while he was engaged in the personal mission of traveling to Texas for a job interview.[11]

In a letter dated February 26, 2015, appellant, through counsel, requested reconsideration of OWCP's May 6, 2014 decision. He submitted a January 23, 2015 medical report of Dr. Earl.

In a decision dated March 5, 2015, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence and argument he submitted in support of his reconsideration request was irrelevant because his claim was denied on a factual basis, *i.e.*, failure to establish an injury in the performance of duty, rather than a medical basis.

In a letter dated April 21, 2015, appellant, through counsel, again requested reconsideration of OWCP's May 6, 2014 decision.

Appellant submitted copies of e-mails that were exchanged between him and a TCFP national program manager. In an April 8, 2015 e-mail to the coordinator, he referred to himself

[11] OWCP also found that, even if appellant had established the factual aspect of his case, he did not submit medical evidence establishing that a medical condition was causally related "to the work injury or event of [January 25, 2013] as alleged."

as a TCFP intern in the class of 2011. Appellant advised that in January 2013 he was traveling to Texas for a site visit on a short detail and that, while he was in Texas, he was also going to interview for a permanent placement position with the Valley Coastal Bend Health Care System. He asked the coordinator to provide an opinion regarding whether he was in the line of duty while traveling to Valley Coastal Bend Health Care System facilities for a site visit. In an April 9, 2015 e-mail, the coordinator replied, "As long as you were on official travel orders for a site visit as part of your two-year training program, I would consider that on duty as for another other [sic] official trip you would take for [Valley Coastal Bend]."

By decision dated November 25, 2015, OWCP denied modification of its May 6, 2014 decision finding that appellant had not established an injury in the performance of duty on January 25, 2013. It found that his activities on January 25, 2013 did not occur in the course of his employment or arising out of his employment.

LEGAL PRECEDENT

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[12] The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[13] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in the master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she is reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[14] This alone is not sufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[15]

The Board has held that, where an employee is on travel status or a TDY assignment, he or she is covered by FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his or her temporary assignment.[16]

[12] 5 U.S.C. § 8102(a).

[13] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

[14] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[15] *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

[16] *D.R.*, Docket No. 16-1395 (issued February 2, 2017); *T.C.*, Docket No. 16-1070 (issued January 24, 2017).

ANALYSIS

On January 23, 2014 appellant filed a Form CA-1 claiming that on January 25, 2013 he sustained injury due to a motor vehicle accident that occurred near Louisville, Kentucky, on the first day of a work-related trip. He claimed that on January 25, 2013 he was on orders to proceed to a detailed assignment at the employing establishment's Valley Coastal Bend Health Care System facilities in Harlingen and Corpus Christi, Texas. Appellant noted that he participated in a training program known as the TCFP, which required him to find a new job prior to the two-year anniversary of his first participation in the program, with his two-year anniversary being September 26, 2013. He asserted that on January 25, 2013 his appointed place of duty was to travel to Texas for a site visit and possible job placement there since his current employment site, the employing establishment Medical Center, did not have a permanent position for him as indicated by the 120-Day Commitment Agreement he signed in connection with his participation in the TCFP. Appellant asserted that he was required by the TCFP to travel to another site for job placement. The employing establishment controverted appellant's claim and advised that he was not performing his work duties or anything incidental to such duties on January 25, 2013.

The Board notes that there is conflicting evidence in the record as to whether appellant's January 25, 2013 accident occurred while he was on an employment-related site visit or whether he was on a personal job hunting trip. As noted above, a claimed injury must arise in the course of employment to be deemed a compensable injury in the performance of duty and, to arise in the course of employment, the injury must occur at a time when the employee may reasonably be stated to be engaged in the master's business, at a place where he or she may reasonably be expected to be in connection with the employment, and while he or she is reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto.[17] The contradictory evidence in the case record regarding the nature and purpose of appellant's trip to Texas in January 2013 means that the Board is currently unable to make a determination, under the relevant standards, regarding whether he sustained an injury in the performance of duty on January 25, 2013.

A workers' compensation specialist for the employing establishment indicated that appellant was not on a work-detail status from the employing establishment Medical Center as alleged and that he was not on an official TDY or travel assignment at the time of his January 25, 2013 accident. However, although appellant's immediate supervisor noted that on January 25, 2013 appellant was "not in a detail status," she also made the contradictory statement that he was "in a travel status."

In addition, a TCFP national program manager provided evidence regarding the nature and purpose of appellant's January 2013 trip to Texas which contradicts evidence from appellant's immediate supervisor and the workers' compensation specialist for the employing establishment.[18] In an April 8, 2015 e-mail to the TCFP national program manager, appellant advised that in January 2013 he was traveling to Texas for a site visit on a short detail and that,

[17] *See supra* note 14. *See also C.R.*, Docket No. 17-0065 (issued March 28, 2017).

[18] Appellant's immediate supervisor and the workers' compensation specialist for the employing establishment provided opinions that appellant was not in the performance of duty at the time of the January 25, 2013 accident.

while he was in Texas, he was also going to interview for a permanent placement position with the Valley Coastal Bend Health Care System. He asked the TCFP national program manager to provide an opinion regarding whether he was in the line of duty while traveling to the Valley Coastal Bend Health Care System facilities for a site visit. In an April 9, 2015 e-mail, she replied, "As long as you were on official travel orders for a site visit as part of your two-year training program, I would consider that on duty as for another other [sic] official trip you would take for [Valley Coastal Bend]."[19]

Further uncertainty regarding the relationship of appellant's trip to his employment is created by the fact that expenses for his trip were reimbursed by the employing establishment.[20] The record reflects that a TCFP official in Atlanta advised him on January 24, 2013 that he could use TCFP funds for his trip to Texas, and that his request for reimbursement of expenses for the period January 25 to February 5, 2013 was later approved by his immediate supervisor.[21]

Given the above-noted conflicting evidence in the case record, the Board finds that the case must be remanded to OWCP for further development of the question of whether appellant established an injury in the performance of duty on January 25, 2013. After carrying out this development, OWCP shall issue a *de novo* decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish an injury in the performance of duty on January 25, 2013. The case is remanded to OWCP for further development.

[19] Appellant argued that the fact that TCFP required him to find a new job prior to his two-year anniversary in the program meant that his job search activities would be considered part of his official duties. The Board notes that there is evidence that, a day prior to the start of the trip on January 25, 2013, appellant's immediate supervisor was aware of appellant's trip to conduct interviews for a potential new job at facilities in Texas. The record does not contain a clear statement from an employing establishment official regarding whether the ostensible requirement that appellant had to find employment outside the TCFP rendered the January 2013 trip to Texas related to his employment.

[20] The evidence of record indicates that appellant was driving his personal vehicle at the time of the January 25, 2013 accident, but he was reimbursed for mileage placed on the vehicle.

[21] A March 28, 2013 e-mail sent to appellant through an automated response system indicates, "You have an Expense Report which has been approved," and lists his immediate supervisor as the "Final Approver."

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 15, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board